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REORGANIZATION UNDER THE BANKRUPTCY CODE - CHAPTER 11

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a "reorganization" bankruptcy.

HOW CHAPTER 11 WORKS

A bankruptcy case commences when a bankruptcy petition is filed with the bankruptcy court. *Fed. R. Bankr. P. 1002*. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. *11 U.S.C. §§ 301, 303*. A voluntary petition should adhere to the format of Form 1 of the Official Forms prescribed by the Judicial Conference of the United States. The Official Forms may be purchased at legal stationery stores. The voluntary petition will include standard information concerning the debtor's name(s), social security number or tax identification number, residence, location of principal assets (if a business), the debtor's plan or intention to file a plan, and a request for relief under the appropriate chapter of the Bankruptcy Code. In addition, the voluntary petition will indicate whether the debtor qualifies as a small business as defined in 11 U.S.C. § 101(51C) and whether the debtor elects to be considered a small business under 11 U.S.C. § 1121(e).

Upon the filing of a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for such relief, the debtor automatically assumes an additional identity as the "debtor in possession." *11 U.S.C. § 1101*. The term refers to a debtor that keeps possession and control of its assets while undergoing a reorganization under chapter 11, without the appointment of a case trustee. A debtor will remain a debtor in possession until the debtor's plan of reorganization is confirmed, the debtor's case is dismissed or converted to chapter 7, or a chapter 11 trustee is appointed. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession," operates the business and performs many of the functions that a trustee performs in cases under other chapters. *11 U.S.C. § 1107(a)*.

A written disclosure statement and a plan of reorganization must be filed with the court. *11 U.S.C. § 1121*. The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. *11 U.S.C. § 1125*. The information required is governed by judicial discretion and the circumstances of the case. The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. *11 U.S.C. § 1123*. Creditors whose claims are "impaired," *i.e.* those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan vote on the plan by ballot. *11 U.S.C. § 1126*. After the disclosure statement is approved and the ballots are collected and tallied, the bankruptcy court will conduct a confirmation hearing to determine whether to confirm the plan. *11 U.S.C. § 1128*.

THE CHAPTER 11 DEBTOR IN POSSESSION

While individuals are not precluded from using chapter 11, it is more typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation (corporation as debtor) does not put the personal assets of the stockholders at risk other than the value of their investment in the company's stock. A sole proprietorship (owner as debtor), on the other hand, does not have an identity separate and distinct from its owner(s); accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners. In a partnership bankruptcy case (partnership as debtor), however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners may, themselves, be forced to file for bankruptcy protection.

Section 1107 of the Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and requires the performance of all but the investigative functions and duties of a trustee. These duties are set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. *11 U.S.C. §§ 1106, 1107; Fed. R. Bankr. P. 2015(a).* Such powers and duties include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the United States trustee, such as monthly operating reports. The debtor in possession also has many of the other powers and duties of a trustee including the right, with the court's approval, to employ attorneys, accountants, appraisers, auctioneers, or other professional persons to assist the debtor during its bankruptcy case. Other responsibilities include filing tax returns and filing such reports as are necessary or as the court orders after confirmation, such as a final accounting. The United States trustee is responsible for monitoring the compliance of the debtor in possession with the reporting requirements.

It should be noted that railroad reorganizations have specific requirements under subsection IV of Chapter 11 which will not be addressed here and that stock and commodity brokers are prohibited from filing under chapter 11 and are restricted to chapter 7. *11 U.S.C. § 109(d).*

THE SMALL BUSINESS DEBTOR

A small business debtor is defined by the Bankruptcy Code as a person engaged in commercial or business activities (not including a person that primarily owns or operates real property) that has aggregate noncontingent liquidated secured and unsecured debts that do not exceed $2,000,000. *11 U.S.C. § 101(51C).* If a debtor qualifies and elects to be considered a small business under 11 U.S.C. § 1121(e), the case is put on a "fast track" and treated differently than a regular chapter 11 case under the Code. For example, the appointment of a creditors' committee and a separate hearing to approve the disclosure statement are not mandatory in a small business case. *11 U.S.C. § 1102(a)(3).* A small business case proceeds faster than a regular chapter 11 case because the court may conditionally approve a disclosure statement, subject to final approval after notice and

a hearing and solicitation of votes for acceptance or rejection of the plan. Thereafter, the disclosure statement hearing may be combined with the confirmation hearing. *11 U.S.C. § 1125(f).* In addition, the debtor has a shortened period of time (100 days from the date of the order for relief) within which only the debtor may file a plan. After the 100-day period expires, any party in interest may file a plan; however, all plans must be filed within 160 days from the date of the order for relief. *11 U.S.C. § 1121(e).*

THE SINGLE ASSET REAL ESTATE DEBTOR

Another type of debtor that has special provisions under the Bankruptcy Code is a single asset real estate debtor. The term "single asset real estate" is defined as "a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor" other than operating the real property and which has aggregate noncontingent liquidated secured debts of no more than $4,000,000. *11 U.S.C. § 101(51B).* The Bankruptcy Code provides circumstances under which creditors of a single asset real estate debtor may obtain relief from the automatic stay which are not available to creditors in ordinary bankruptcy cases. *11 U.S.C. § 362(d).* On request of a creditor with a claim secured by the single asset real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor unless the debtor files a feasible plan of reorganization or begins making interest payments to the creditor within 90 days from the date of the order for relief. The interest payments must be equal to the current fair market interest rate on the value of the creditor's interest in the real estate. *11 U.S.C. § 362(d)(3).*

THE AUTOMATIC STAY

The automatic stay provides for a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. As with cases under other chapters of the Bankruptcy Code, a stay of creditor actions against the debtor automatically goes into effect when the bankruptcy petition is filed. *11 U.S.C. § 362(a).* The filing of a petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b). The stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor's financial situation.

Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic stay. For example, when the debtor has no equity in the property and that property is not necessary for an effective reorganization, the secured creditor can seek an order of the court lifting the stay to permit the creditor to foreclose on the property, sell it, and apply the proceeds to the debt. *11 U.S.C. § 362(d).*

It should be noted that, although creditors are stayed from action against the debtor unless relief is granted by the court, section 331 of the Bankruptcy Code permits applications for fees to be made by certain professionals during the case. Thus, a trustee, a debtor's attorney, or any

professional person appointed by the court may apply to the court at intervals of 120 days for interim compensation and reimbursement payments. In very large cases with extensive legal work the court may permit more frequent applications. Although professional fees may be paid pursuant to authorization by the court, the debtor cannot make payments to professional creditors on prepetition obligations, *i.e.*, obligations which arose before the filing of the bankruptcy petition. The ordinary expenses of the ongoing business, however, continue to be paid.

CREDITORS' COMMITTEES

Creditors' committees can play a major role in chapter 11 cases. The United States trustee, a federal employee to be distinguished from a private case trustee or panel trustee, appoints the committee, which ordinarily consists of unsecured creditors who hold the seven largest unsecured claims against the debtor. *11 U.S.C. § 1102*. The committee may consult with the debtor in possession on the administration of the case, investigate the conduct of the debtor and the operation of the business, and participate in the formulation of a plan. *11 U.S.C. § 1103*. A creditors' committee may, with the court's approval, hire an attorney or other professionals to assist in the performance of the committee's duties. A creditors' committee can be an important safeguard to the proper management of the business by the debtor in possession.

WHO CAN FILE A PLAN

There is no specific statutory time limit set for the filing of a plan; however, the debtor (unless a "small business" debtor, as set out above) has a 120-day period during which it has an exclusive right to file a plan. *11 U.S.C. § 1121(b)*. The debtor's exclusive period in which to file a plan may be extended or reduced by the court. After the exclusive period has expired, a creditor or the case trustee may file a competing plan. The United States trustee may not file a plan. *11 U.S.C. § 307*.

A chapter 11 case may continue for many years unless the court, the United States trustee, the committee, or another party in interest acts to ensure the case's timely resolution. The creditors' right to file a competing plan provides incentive for the debtor to file a plan within the exclusive period and acts as a check on excessive delay in the case.

AVOIDABLE TRANSFERS

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. Such powers may be used to undo a transfer of money or property made during a certain period of time prior to the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgorgement" of the payments or property, which then are available to pay all creditors. Generally, the power to avoid transfers is effective against transfers made within 90 days prior to the filing of the petition. However, transfers to insiders (*i.e.*, relatives, general partners, and directors or officers of the debtor) made up to a year prior to filing can be avoided. *11 U.S.C. §§ 101(31), 101(54), 547, 548*. In

addition, under 11 U.S.C. § 544, the trustee is given the authority to avoid transfers under applicable state law, which often provides for longer time periods. Avoiding powers are used, for example, to prevent unfair prepetition payments to one creditor at the expense of all other creditors.

CASH COLLATERAL, ADEQUATE PROTECTION, AND OPERATING CAPITAL

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter 11 case, other issues may arise which must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise. *11 U.S.C. § 363(c).* If the intended sale or use is outside the ordinary course of its business, the debtor must obtain permission from the court. A debtor in possession may not use "cash collateral," *i.e.*, collections of accounts subject to security interests or proceeds from the sale of pledged inventory or equipment, without the consent of the secured party or authorization by the court which must first examine whether the interest of the secured party is adequately protected. *11 U.S.C. § 363.*

When "cash collateral" is used (spent), the secured creditors are entitled to receive additional protection under section 363 of the Bankruptcy Code. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization for the debtor in possession's use of cash collateral, the debtor in possession must segregate and account for all cash collateral in its possession. *11 U.S.C. § 363(c)(4).* A party with an interest in property being used by the debtor may request that the court prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor.

Adequate protection may be required to protect the value of the creditor's interest in the property being used by the debtor in possession. This is especially important when there is a decrease in value of the property. The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the creditor's property interest being adequately protected. *11 U.S.C. § 361*.

When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved "superpriority" over other unsecured creditors or a lien on property of the estate. *11 U.S.C. § 364.*

APPOINTMENT OR ELECTION OF A CASE TRUSTEE

Although the appointment of a case trustee is a rarity in a chapter 11 case, a party in interest

or the United States trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the United States trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. *11 U.S.C. § 1104(a)*. The trustee is appointed by the United States trustee, after consultation with parties in interest and subject to the court's approval. *Fed. R. Bankr. P. 2007.1*. Alternatively, a trustee in a case may be elected if a party in interest requests the election of a trustee within 30 days after the court orders the appointment of a trustee. In that instance, the United States trustee convenes a meeting of creditors for the purpose of electing a person to serve as trustee in the case. *11 U.S.C. § 1104(b)*.

The case trustee is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Code requires the trustee to file a plan "as soon as practicable" or, alternatively to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. *11 U.S.C. § 1106(a)(5)*.

The court, after notice and hearing, may, at any time before confirmation, upon the request of a party in interest or the United States trustee, terminate the trustee's appointment and restore the debtor to possession and management of the property of the estate and of the operation of the debtor's business. *11 U.S.C. § 1105*.

THE ROLE OF AN EXAMINER

The appointment of an examiner in a chapter 11 case is rare. The role of an examiner is generally more limited than that of a trustee. The examiner is authorized to perform the investigatory functions of the trustee and is required to file a statement of any investigation conducted. If ordered to do so by the court, however, an examiner may carry out any other duties of a trustee that the court orders the debtor in possession not to perform. *11 U.S.C. § 1106.* Each court has the authority to determine the duties of an examiner in each particular case. In some cases, the examiner may file a plan of reorganization, negotiate or help the parties negotiate, or review the debtor's schedules to determine whether some of the claims are improperly categorized. Sometimes, the examiner may be directed to determine if objections to any proofs of claim should be filed or whether causes of action have sufficient merit so that further legal action should be taken. An examiner may not serve as a trustee. *11 U.S.C. § 321*.

THE UNITED STATES TRUSTEE OR BANKRUPTCY ADMINISTRATOR

In addition to the case trustee or examiner and the creditors' committee, the United States trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The United States trustee is responsible for monitoring the debtor in possession's operation of the business, and the submission of operating reports and fees. Additionally, the U. S. Trustee monitors applications for compensation and reimbursement by professionals, plans and disclosure statements filed with the court, and creditors' committees. The United States trustee conducts a meeting of creditors, often referred to as the "section 341 meeting," in a chapter 11 case. *11 U.S.C. § 341*. The United States trustee and creditors may question the debtor or the debtor's corporate representative under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case.

The United States trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, the establishment of new bank accounts, and the payment of current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the United States trustee for each quarter of a year until the case is converted or dismissed. *28 U.S.C. § 1930(a)(6).* The amount of the fee, which may range from $250 to $10,000, depends upon the amount of the debtor's disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the United States trustee or orders of the bankruptcy court or fail to take the appropriate steps to bring the case to confirmation, the United States trustee may file a motion with the court to have the debtor's chapter 11 case converted to a case under another chapter of the Code or to have the case dismissed.

It should be noted that in North Carolina and Alabama, bankruptcy administrators perform similar functions that United States trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the United States trustee program is administered by the Department of Justice. For purposes of this fact sheet, references to United States trustees are also applicable to bankruptcy administrators.

MOTIONS

Prior to confirmation of a plan, there are several activities that may take place in a chapter 11 case. The continued operation of the debtor's business may lead to the filing of a number of contested motions. The most common are those seeking relief from the automatic stay, the use of cash collateral, or to obtain credit. There may also be litigation over executory (*i.e.*, unfulfilled) contracts and unexpired leases and the assumption or rejection of those executory contracts and unexpired leases by the debtor in possession. *11 U.S.C. § 365*. Delays in formulating, filing, and obtaining confirmation of a plan often cause creditors to file motions for relief from stay or motions to convert the case to a chapter 7 or to dismiss the case altogether.

ADVERSARY PROCEEDINGS

Frequently, the debtor in possession will institute a lawsuit, known as an adversary proceeding, to recover money or property for the estate. Adversary proceedings may take the form of lien avoidance actions, actions to avoid preferences, actions to avoid fraudulent transfers, or actions to avoid post petition transfers. Such proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure. At times, a creditors' committee may be authorized by the bankruptcy court to pursue these actions against insiders of the debtor if the plan provides for the committee to do so or if the debtor has refused a demand to do so. Creditors may also initiate adversary proceedings by filing complaints to determine the validity or priority of a lien, to revoke an order confirming a plan, to determine the dischargeability of a debt, to obtain an injunction, or to subordinate a claim of another creditor.

CLAIMS

A claim is a right to payment or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. *11 U.S.C. § 101(5).* In some instances, a creditor must file a proof of claim form along with documentation evidencing the validity and amount of the claim. When proofs of claim are required to be filed, creditors must file the proofs of claim with the bankruptcy clerk in the district where the case is pending. The clerk is required to keep a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors. *Fed. R. Bankr. P. 5003(b).* Most creditors whose claims are scheduled (*i.e.*, claims listed by the debtor on the debtor's schedules), but not listed as disputed, contingent, or unliquidated, need not file claims because the schedule of liabilities is deemed to constitute evidence of the validity and amount of those claims. *11 U.S.C. § 1111.* Any creditor whose claim is not scheduled, or is scheduled as disputed, contingent, or unliquidated, must file a proof of claim in order to be treated as a creditor for purposes of voting on the plan and distribution under it. *Fed. R. Bankr. P. 3003(c)(2).* If a scheduled creditor chooses to file a claim, a properly filed proof of claim supersedes any scheduling of that claim. *Fed. R. Bankr. P. 3003(c)(4).* It is the responsibility of the creditor to determine whether the claim is accurately listed. The debtor must provide notification to those creditors whose names are added and whose claims are listed as a result of an amendment to the schedules. The notification also should advise such creditors of their right to file proofs of claim and that their failure to do so may prevent them from voting upon the debtor's plan of reorganization or participating in any distribution under that plan. When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated claims, the debtor must provide notice of the amendment to any entity affected. *Fed. R. Bankr. P. 1009(a).*

EQUITY SECURITY HOLDERS

An equity security holder is a holder of an equity security of the debtor. Examples of an equity security are a share in a corporation, an interest of a limited partner in a limited partnership, or a right to purchase, sell, or subscribe to a share, security, or interest of a share in a corporation or an interest in a limited partnership. *11 U.S.C. §§ 101(16), (17).* An equity security holder may vote

on the plan of reorganization and may file a proof of interest, rather than a proof of claim. A proof of interest is deemed filed for any interest that appears in the debtor's schedules, unless it is scheduled as disputed, contingent, or unliquidated. *11 U.S.C. § 1111*. An equity security holder whose interest is not scheduled or scheduled as disputed, contingent, or unliquidated must file a proof of interest in order to be treated as a creditor for purposes of voting on the plan and distribution under it. *Fed. R. Bankr. P. 3003(c)(2).* A properly filed proof of interest supercedes any scheduling of that interest. *Fed. R. Bankr. P. 3003(c)(4).* Generally, most of the provisions that apply to proofs of claim, as discussed above, are also applicable to proofs of interest.

CONVERSION OR DISMISSAL

A debtor in a case under chapter 11 has a one-time absolute right to convert the chapter 11 case to a case under chapter 7 unless (1) the debtor is not a debtor in possession, (2) the case originally was commenced as an involuntary case under chapter 11, or (3) the case was converted to a case under chapter 11 other than at the debtor's request. *11 U.S.C. § 1112(a).* A debtor in a chapter 11 case does not have an absolute right to have the case dismissed upon request.

Generally, upon the request of a party in interest in the case or the United States trustee, after notice and hearing and "for cause," the court may convert a chapter 11 case to a case under chapter 7 or dismiss the case, whichever is in the best interest of creditors and the estate. *11 U.S.C. § 1112(b).* The court may convert or dismiss a case "for cause" when there is a continuing loss to the estate, an inability to effectuate a plan, unreasonable delay that is prejudicial to creditors, denial or revocation of confirmation, or inability to consummate a confirmed plan.

There are important exceptions to the conversion process in a chapter 11 case. One exception is that, unless the debtor requests the conversion, section 1112(c) of the Code prohibits the court from converting a case involving a farmer or charitable institution to a liquidation case under chapter 7.

THE DISCLOSURE STATEMENT

The filing of a written disclosure statement is preliminary to the voting on a plan of reorganization, and the disclosure statement must provide "adequate information" concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. *11 U.S.C. § 1125*. After the disclosure statement is filed, the court must hold a hearing to determine whether the disclosure statement should be approved. Acceptance or rejection of a plan cannot be solicited without prior court approval of the written disclosure statement. *11 U.S.C. § 1125(b).* After the disclosure statement has been approved, the debtor or proponent of a plan can begin to solicit acceptances of the plan, and creditors may also solicit rejections of the plan. Fed. R. Bankr. P. 3017(d) requires that, upon approval of a disclosure statement, the following must be mailed to the United States trustee and all creditors and equity security holders: (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice

of the time within which acceptances and rejections of the plan may be filed; and (4) such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion. *Fed. R. Bankr. P. 3017(d).* In addition, the debtor must mail to the creditors and equity security holders entitled to vote on the plan or plans (1) notice of the time fixed for filing objections; (2) notice of the date and time for the hearing on confirmation of the plan; and (3) a ballot for accepting or rejecting the plan and, if appropriate, a designation for the creditors to identify their preference among competing plans. *Id*. However, in a small business case, the court may conditionally approve a disclosure statement subject to final approval after notice and a combined disclosure statement/plan confirmation hearing. *11 U.S.C. § 1125 (F).*

ACCEPTANCE OF THE PLAN OF REORGANIZATION

As noted earlier, during the first 120-day period after the filing of the voluntary bankruptcy petition, which filing also acts as the order of relief, only the debtor in possession may file a plan of reorganization. The debtor in possession has 180 days after the filing of the voluntary petition (or in a case commenced by an involuntary petition, after the order for relief) to obtain acceptances of the plan. *11 U.S.C. § 1121*. For cause, the court may extend or reduce this exclusive period. *11 U.S.C. § 1121(d).* The exclusive right of the debtor in possession to file a plan is lost and any party in interest, including the debtor, may file a plan if and only if (1) a trustee has been appointed in the case, (2) the debtor has not filed a plan within the 120-day exclusive period or any extension granted by the court, or (3) the debtor has not filed a plan which has been accepted by each class of claims or interests that is impaired under the plan within the 180-day period or any extensions granted by the court. *11 U.S.C. § 1121.*

If the exclusive period expires before the debtor has filed and obtained acceptance of a plan, other parties in interest in a case, such as the creditors' committee or a creditor, may file a plan. Such a plan may compete with a plan filed by another party in interest or by the debtor. If a trustee is appointed, the trustee is responsible for filing a plan, a report of why the trustee will not file a plan, or a recommendation for the conversion or dismissal of the case. *11 U.S.C. § 1106(a)(5).* A proponent of a plan is subject to the same requirements as the debtor with respect to disclosure and solicitation.

It should be noted that, in a chapter 11 case, a liquidating plan is permissible. Such a plan often allows the debtor in possession to liquidate the business under more economically advantageous circumstances than a chapter 7 liquidation. It also permits the creditors to take a more active role in fashioning the liquidation of the assets and the distribution of the proceeds than in a chapter 7 case.

Section 1123(a) of the Bankruptcy Code lists the mandatory provisions of a chapter 11 plan and section 1123(b) lists the discretionary provisions. Section 1123(a)(1) provides that a chapter 11

plan shall designate classes of claims and interests for treatment under the reorganization. Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders.

Under section 1126(c) of the Code, an entire class of claims accepts a plan if the plan is accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims in the class. Under section 1129(a)(10), if there are impaired classes of claims, the court cannot confirm a plan unless the plan has been accepted by at least one class of non-insiders who hold impaired claims. "Impaired" claims are claims that are not going to be paid completely or in which some legal, equitable, or contractual right is altered. Moreover, under section 1126(f), holders of unimpaired claims are deemed to have accepted the plan.

Under section 1127(a) of the Bankruptcy Code, the proponent may modify the plan at any time before confirmation, but the plan as modified must meet all the requirements of chapter 11. Federal Rule of Bankruptcy Procedure 3019 provides that, when there is a proposed modification after balloting has been conducted and the court finds after a hearing that the proposed modification does not adversely affect the treatment of any creditor who has not accepted the modification in writing, the modification shall be deemed to have been accepted by all creditors who previously accepted the plan. If it is determined that the proposed modification does have an adverse effect on the claims of nonconsenting creditors, then another balloting must take place.

Because more than one plan may be submitted to the creditors for approval, Federal Rule of Bankruptcy Procedure 3016(a) requires that every proposed plan and modification be dated and identified with the name of the entity or entities submitting such plan or modification. When competing plans are presented and meet the requirements for confirmation, the court must consider the preferences of the creditors and equity security holders in determining which plan to confirm.

Any party in interest may file an objection to confirmation of a plan. The Bankruptcy Code requires the court, after notice, to hold a hearing on the confirmation of a plan. If no objection to confirmation has been timely filed, the Code allows the court to determine that the plan has been proposed in good faith and according to law. *Fed. R. Bankr. P. 3020(b)(2).* Before confirmation can be granted, the court must be satisfied that there has been compliance with all the other requirements of confirmation set forth in section 1129 of the Code, even in the absence of any objections. In order to confirm the plan, the court must find that (1) the plan is feasible, (2) it is proposed in good faith, and (3) the plan and the proponent of the plan are in compliance with the Code. In addition, the court must find that confirmation of the plan is not likely to be followed by liquidation or the need for further financial reorganization.

THE DISCHARGE

While some courts have a practice of issuing a discharge order in a case involving an individual, a separate order of discharge is usually not entered in a chapter 11 case. Section 1141(d)(1) specifies that the confirmation of a plan discharges the debtor from any debt that arose before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new contractual rights, replacing or superseding pre-bankruptcy contracts.

There are, of course, exceptions to the general rule that an order confirming a plan operates as a discharge. Confirmation of a plan of reorganization will discharge any type of debtor-corporation, partnership, or individual- from most types of prepetition debts. It does not, however, discharge an individual debtor from any debt made nondischargeable by section 523 of the Bankruptcy Code. Confirmation does not discharge the debtor if the plan is a liquidation plan, as opposed to one of reorganization, and the debtor is not an individual. When the debtor is an individual, confirmation of a liquidation plan will effect a discharge unless grounds would exist for denying the debtor a discharge if the case were proceeding under chapter 7 instead of chapter 11. *11 U.S.C. §§ 1141(d)(2), 727(a).*

POSTCONFIRMATION MODIFICATION OF THE PLAN

At any time after confirmation and before "substantial consummation" of a plan, the proponent of a plan may modify a plan if the modified plan would meet certain Bankruptcy Code requirements. *11 U.S.C. § 1127(b).* This should be distinguished from preconfirmation modification of the plan. A modified postconfirmation plan does not automatically become the plan. A modified postconfirmation plan in a chapter 11 case becomes the plan only "if circumstances warrant such modification" and the court, after notice and hearing, confirms the plan as modified pursuant to chapter 11 of the Code.

POSTCONFIRMATION ADMINISTRATION

Federal Rule of Bankruptcy Procedure 3020(d) provides that, "[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." This authority would include the postconfirmation determination of objections to claims or adversary proceedings which must be resolved before a plan can be fully consummated. Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation. A chapter 11 trustee or debtor in possession has a number of responsibilities to perform after confirmation, including consummating the plan, reporting on the status of consummation, and applying for a final decree.

REVOCATION OF THE CONFIRMATION ORDER

A revocation of the confirmation order is an undoing or cancellation of the confirmation of a plan. A request for revocation of confirmation, if made at all, must be made by a party in interest within 180 days of confirmation. The court, after notice and hearing, may revoke a confirmation order "if and only if [the confirmation] order was procured by fraud." *11 U.S.C. § 1144*.

THE FINAL DECREE

A final decree closing the case must be entered after the estate has been "fully administered." *Fed. R. Bankr. P. 3022*. Local bankruptcy court policies may determine when the final decree should be entered and the case closed.